



required. Regardless, the appointing authority was able to contact the appellant's employers to ascertain the amount that she earned during the time she was not employed by the appointing authority. Additionally, it contends that the appellant's back pay award must be reduced by her unemployment benefits received. It indicates that the appellant's gross back pay was \$87,785.74 less \$49,609.71 for wages earned and unemployment received, bringing her new gross back pay award to \$38,176.03. Further, her back pay must be reduced by \$19,391.10 for back taxes and deductions, which nets to \$18,784.93, which is the amount that she received. The appointing authority spent a significant amount of time and resources computing her back pay as the appellant never provided any information concerning her mitigation. However, it indicates that it paid her the amount she was owed in a timely fashion and any allegation of bad faith or delay on the appointing authority's part is unwarranted.

Regarding counsel fees, the appointing authority's it presents that Nash submitted a certification seeking a \$200 hourly rate for his services. The appointing authority indicates that it repeatedly asked for his fee arrangement, but did not receive it. Specifically, it requested that Nash provide his union contract that secured his representation of the appellant. Initially, Nash responded that he could not provide it without the union's permission. Thereafter, the appointing authority repeatedly made the request, but it was to no avail. In response to this matter, Nash produced a fee arrangement that was only effective January 30, 2019. However, a significant portion of this case occurred in 2018. It maintains that it is entitled to the fee arrangement that was in place during the entire time Nash represented the appellant to ensure that it is not being charged more than the arrangement provides. Further, the fee arrangement indicates that fees are raised when counsel fees are awarded. The appointing authority argues that attorney fees should be reimbursed in this case only when they are reasonable and related to the actual expenses the union would have paid if counsel fees were not awarded, and not for a heightened amount simply because someone else is providing the fees. Moreover, the appointing authority objects to the \$200 hourly rate because it believes that this rate is not reasonable for a standard employee removal matter that did not involve complex issues. Additionally, the appointing authority states that Nash is not entitled to receive normal overhead costs such as printing, copying, postage and delivery that were included in his certification of services.

In response, the appellant presents that the fee arrangement between Nash and the union expressly stated that if she were to prevail and counsel fees were awarded, that fees shall be calculated as set forth by *N.J.A.C.* 4A:2-2.12. The appellant submits a certification from Nash setting forth his extensive experience and length of service. Further, she argues that the appointing authority's arguments that this matter was not a complicated case is irrelevant as she is not seeking attorney fees more than the statutory range. Additionally, the appellant argues that although a copy of the fee arrangement was provided, this was not required as the

appellant is only required to disclose the fee arrangement. She submits a certification from the union representative stating that the fee arrangement was the same for the duration of the representation in this matter. Further, the appellant argues that the appointing authority is not entitled to benefit from the fee agreement which indicates that the fee is fixed in situations where the union member has not prevailed as the arrangement provides for the hourly rate to be determined under *N.J.A.C. 4A:2-2.12(c)3*, which in this case is \$200 per hour, when a member does prevail. However, the appellant does agree to reduce the award amount by \$6.53 for postage. She further requests additional counsel fees for the enforcement of the back pay award.

Regarding the fee arrangement with the union, the appointing authority states that *N.J.A.C. 4A:2-2.12(d)* requires that Nash provide the actual fee agreement and that he is not entitled to any fee greater than the amount set forth in the agreement. The appointing authority argues that by failing to provide the 2017 and 2018 fee arrangements, he is attempting to skirt the issue by providing a certification from the union representative which does not state that fee arrangements for 2017 or 2018 do not exist. Further, the appointing authority reiterates its prior argument that Nash does not address the appointing authority's position that he is not entitled to receive an hourly rate greater than the amount he would be paid if counsel fees were not awarded.

## CONCLUSION

*N.J.A.C. 4A:2-2.12(c)3* provides, in pertinent part, that subject to the provisions of (d) and (e), the range in determining counsel fees for a partner or equivalent in a law firm with 15 or more years of experience in the practice of law, or, notwithstanding the number of years of experience, with a practice concentrated in employment or labor law is \$175.00 to \$200.00 per hour.

*N.J.A.C. 4A:2-2.12(d)* provides that if an attorney has signed a specific fee agreement with the employee or employee's negotiations representative, the attorney shall disclose the agreement to the appointing authority. The fee ranges set forth in (c) may be adjusted if the attorney has signed such an agreement, provided that the attorney shall not be entitled to a greater rate than that set forth in the agreement.

*N.J.A.C. 4A:2-2.12(e)* provides that a fee amount may also be determined or the fee ranges in (c) adjusted based on the circumstances of a particular matter, in which case the following factors (see the Rules of Professional Conduct of the New Jersey Court Rules, at RPC 1.5(a)) shall be considered:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

2. The fee customarily charged in the locality for similar legal services, applicable at the time the fee is calculated;
3. The nature and length of the professional relationship with the employee; and
4. The experience, reputation and ability of the attorney performing the services.

*N.J.A.C.* 4A:2-2.12(g) provides that reasonable out-of-pocket costs shall be awarded, including, but not limited to, costs associated with expert and subpoena fees and out-of-State travel expenses. Costs associated with normal office overhead shall not be awarded.

With respect to the appellant's award of back pay under *N.J.A.C.* 4A:2-2.10, the appointing authority provided a detailed accounting as to how it calculated that the net pay due was \$18,784.93. Further, the appellant has not provided any response that would indicate that this amount is incorrect. Therefore, the Commission finds that appellant was properly awarded net back pay in the amount of \$18,784.93. Additionally, as the appellant has already received this amount, the appellant's request for counsel fees for "enforcement" of the back pay award is denied.

Regarding counsel fees, Nash provided his agreement to provide legal services between himself and the union. The agreement is dated January 30, 2019. The agreement states:

Legal Fees. You agree to pay the Law Firm for legal services at the following rates: Per appearance fee of \$800.00 for matter hear at the OAL in Trenton or Atlantic City. A flat fee of \$800 will be billed for any motions, opposition to motions, reply documents, briefs, discovery responses; and preparation of exceptions or cross-exceptions. Should the matter proceed to a hearing and the member prevails and is awarded counsel fee, the parties agree that the Law Firm will bill legal fees at the maximum hourly rate permitted by *N.J.A.C.* 4A:2-2.12 in lieu of the flat fee rates set forth herein.

Additionally, the union's representative certifies that Nash has been providing legal services for the union for 10 years and their arrangement has always been that if a matter proceeds to a hearing and its member prevails, Nash will be compensated at the maximum hourly rate set forth in *N.J.A.C.* 4A:2-2.12.

Therefore, the Commission finds that Nash has adequately disclosed his fee arrangement with the union as the record evidences that the arrangement during the period of the services provided for this matter indicates that if the appellant were to

prevail, Nash's hourly rate would be the maximum hourly rate permitted by *N.J.A.C.* 4A:2-2.12. Further, based on the information in the union's certification, even if there were different fee agreements in place in 2017 or 2018, Nash would still be entitled to the maximum amount under *N.J.A.C.* 4A:2-2.12 as it certifies that this provision has not changed.

Concerning the appointing authority's argument that counsel fees should be limited to the amount that Nash would have been paid if the appellant had not prevailed, there is nothing in *N.J.A.C.* 4A:2-2.12 that so limits an award of counsel fees.

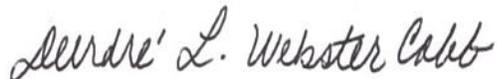
In reference to Nash's hourly rate, his certification indicates that he is a member in a law firm who has 20 years of experience and that a significant portion of his practice involves Civil Service major discipline proceedings. Therefore, the Commission finds that Nash is entitled to an hourly rate of \$200, the maximum hourly rate under *N.J.A.C.* 4A:2-2.12(c)3. Further, a review of Nash's certification of services indicates that he spent 79.20 hours on this matter and there is nothing in the record to indicate that any of this time was unreasonable or unnecessary. Therefore, the Commission finds that the appellant is entitled to counsel fees in the amount of \$15,040 as requested. However, the appellant is not entitled to \$6.53 in postage expenses as this cost represents normal office overhead under *N.J.A.C.* 4A:2-2.12(g). See *In the Matter of Monica Malone*, 381 *N.J. Super.* 344 (App. Div. 2005).

### ORDER

Therefore, the Commission awards \$15,040 in counsel fees. All other requests are denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

ENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 15<sup>TH</sup> DAY OF APRIL, 2020



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